



STATE OF WISCONSIN – JUDICIAL COUNCIL

WISCONSIN JUDICIAL COUNCIL

MARCH 18, 2022 – 9:00 A.M.

CONDUCTED ONLY BY ZOOM

MADISON, WISCONSIN

William Gleisner is inviting you to a scheduled Zoom meeting. On March 18, 2022 at 9 a.m., join the Zoom Council Meeting using the following URL: ¹

<https://us02web.zoom.us/j/88597606743?pwd=SXE3NTNDWGVAQWZhZWU0VWxXeTd1Zz09>. When prompted, enter passcode: 2323

Members of the public will be permitted to attend this meeting but must agree to refrain from disrupting the meeting. If anyone is unsure how to sign into the meeting, please email Bill Gleisner (gleisnerwilliam@gmail.com) or call him at 414-651-3182.

- I. Roll Call and approval of the February 18, 2022 Minutes.
- II. Because Justice Hagedorn is now a member of the Judicial Council, I thought it would be interesting and useful if we review the work of the Council immediately prior to our loss of funding at the end of 2017. Accordingly, I am attaching to the transmittal email by which this Agenda is being circulated all of the Minutes for Council meetings which were conducted during 2016 and 2017. Because I recognize that this represents a fair amount of reading, I am circulating this Agenda two weeks earlier than would normally be the case. I would hope that this will give each of you time to review the 2016/2017 Minutes. It is my hope that a review of

¹ The following is additional information concerning the February 18, 2022 Zoom meeting:

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Meeting ID: 885 9760 6743

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these Minutes may give us ideas for projects going forward. In Section III of this Agenda, I will highlight excerpts from Minutes which caught my eye. In Section IV of this Agenda, I will provide my thoughts based on the 2016/2017 Minutes as to possible projects which the current Council may wish to revisit in the future.

III. We were busy during 2016/2017, to put it mildly. Here is some of what we were doing during that period of time.

- a. In the January 15, 2016 meeting, we discussed possible amendments to the Rules of Criminal Procedure. We also discussed proposed amendments to the Wisconsin Rules of Evidence, Including Wis. Stats. §§ 885.16, 885.17, 885.205, 901.07, 906.01, 906.08, 906.09, and the Creation of a Bias Rule. The Appellate Procedure Committee was busy discussing prisoner appellate rights and the Evidence and Civil Procedure Committee continued its work on revisions to our class action rules. We continued the discussion from the January meeting in both the February and March meetings of the Council. But in March we also discussed service of subpoenas. The following exchange took place at this meeting:

Attorney Southwick distributed a brief memo explaining that the Council previously accepted a project to study whether s. 885.03 and other provisions regarding service satisfy due process notice requirements... Council member Shriner explained that service of process to commence a lawsuit has a three-tiered approach to service. The preference is personal service. Substitute service is only permitted if personal service has been diligently attempted, but was unsuccessful. If a summons is left at the home, it must be left with an adult or a family member over the age of 14... Council member Shriner suggested that this type of service may not be sufficient to satisfy the requirements of due process.

- b. At the May 5, 2016 meeting, the Appellate Procedure Committee demonstrated how the Council and its Committees have historically interacted with stakeholders and how new action proposals have been generated during the course of meetings:

Attorney Southwick reported that the [appellate procedure] committee has circulated proposed amendments regarding the record on appeal and the size and number of briefs in multiparty cases, and has requested feedback from potentially interested parties. Comments are due by June 10, 2016. The committee will begin discussing them at its June 24, 2016 meeting. The committee will continue discussing withdrawal or substitution of counsel at the appellate level. The committee

previously studied rules from other states, and is ready to begin reviewing a draft rule. The committee is also studying the issue of trials in bifurcated cases when one issue is still on appeal. The committee previously sought feedback from the State Bar litigation section board.

- c. The September 16, 2016 meeting demonstrated the usefulness of staff and the breadth of issues considered by the Council. According to the September 16, 2016 Minutes and based on a September 8, 2016 memo prepared by Attorney Southwick, the Council began a detailed discussion of a number of appellate issues. Section IV of these Minutes identified the issues which were then up for discussion and/or action:

Discussion and/or Action Regarding Recommendation to Amend Wis. Stat. § (Rule) 809.107, Appeals in Proceedings Related to Termination of Parental Rights; Wis. Stat. § (Rule) 809.14, Motions; Wis. Stat. § (Rule) 809.15, Record on Appeal, and Wis. Stat. (Rule) 809.19, Briefs and Appendix; Wis. Stat. § (Rule) 809.30, Appeals in s. 971.17 Proceedings and in Criminal, ch. 48, 51, 55, 938, and 980 Cases; Wis. Stat. § (Rule) 809.32, No Merit Reports; and Wis. Stat. § 885.42, When Available (videotape procedure)

- d. Section IV of the October 21, 2016 Minutes demonstrated how the Council prepared for hearings before the Supreme Court by members of the Council regarding petitions filed by the Council. The October 21, 2016 Minutes also revealed the type of discussion which was quite common in the pre-2017 Council regarding criminal procedure:

Council member Gossett added that the committee's study has revealed that not only are there reported problems in some counties regarding the flow of information from the prosecutors to the defense attorneys, but there also appears to be some problems with prosecutors failing to receive all the potentially discoverable information from law enforcement. Committee chair Blanchard agreed, noting that the committee has received reports that some prosecutors are instructing defense counsel to seek discoverable information directly from the investigating law enforcement agencies. Council member Wanggaard inquired whether there is a specific type of information that law enforcement is not providing. Committee chair Blanchard responded that the committee is still studying the issue, but it appears that digital evidence may be a problem, including third party videos. Council member Ptacek stated that in his experience, problems with disclosure can occur when the investigation is on-going after the defendant's initial appearance, but law enforcement fails to

continue to produce information. Council member Gossett explained that body cameras present an additional challenge. For example, if six officers are on the scene with cameras recording, all six videos may be discoverable. Prosecutors do not have time to view all the recordings in some cases.

- e. The December 16, 2016 Minutes demonstrate how the Council would respond to and process feedback provided by the Supreme Court following hearings on Council petitions. According to the December 16, 2016 Minutes:

Council member Shriner reported that the court adopted the Council's recommendation in petition 16-01 to repeal the Deadman's statutes. Council member Shriner explained that with regard to petition 16-02, the court referred the petition back to the Council to provide some additional clarification and consider additional amendments. In particular, the court requested more information regarding the use of 'character for truthfulness' and 'credibility.' Professor Dan Blinka has offered to assist the Council with clarifying that issue for the court. Council member Shriner noted that at least one justice stated a preference for including excerpts from the federal Advisory Committee Notes in the Judicial Council Notes that accompany amendments. Attorney Southwick noted the difficulty in doing that for some rules because the federal rules have been amended more frequently than Wisconsin's rules. Wisconsin's rules were based on the federal model at the time they were adopted, but the language in many of the rules has diverged over the years.

- IV. Based on the 2017 Minutes which have been provide, here are some thoughts I have for possible Council projects moving forward.

- a. Chair Shriner reported for the Evidence and Civil Procedure Committee in the January 20, 2017 Minutes as follows: "[T]he committee is studying the amendment to federal Rule 37 regarding discovery sanctions for failure to preserve evidence. The committee will discuss whether Wisconsin's rule (s. 804.12) should be amended to reflect the federal changes."

My Recommendation: I think it is time for the Council to revisit e-discovery rules in general. I worked on the original e-discovery rules a number of years ago and MU Law Professor Jay Grenig and I have co-authored a treatise entitled *e-Discovery and Digital Evidence* which we have updated every year since 2005. There have been a number of important changes in the area of e-discovery and in the area of electronic evidence since the original e-discovery rules were adopted in Wisconsin. *See, e.g.,*

Wis. Stat. §804.01(2)(e) (“specific limitations on discovery of electronically stored information”). The world has now gone fully electronic and it is time for the Council to review changes which have been made in the Federal Rules regarding e-discovery and electronic information and determine if there are any areas where Wisconsin’s rules should be changed.

- b. The March 17, 2017 Minutes included a report by the then Chair of the Council’s Criminal Procedure Committee, Judge Brian Blanchard. According to Judge Blanchard:

[T]he Criminal Procedure Committee continues to study the discovery process in criminal cases. The committee has agreed to draft a model checklist for use by law enforcement to ensure that all information is transmitted to the prosecutor. The committee also intends to work on a model checklist for use by prosecutors to ensure that all discoverable information is provided to the defendant. The committee’s goals include encouraging consistency in discovery practices throughout the state, and increasing awareness and providing education on issues (for example, production of recordings) that have been identified through surveys the committee has conducted.

My Recommendation: In this day of public interest in police body cameras and subject to the opinion of the current Chair of the Criminal Procedure Committee, it would seem to me that further study of this important issue would be of great benefit.

- c. The April 21, 2017 Minutes contain the following:

Prior to the meeting, Attorney Southwick circulated a memorandum dated April 14, 2017, along with a copy of the Uniform Unsworn Domestic Declarations Act (UUDDA) and Wis. Stat. § 887.015. Attorney Southwick explained that the ... Uniform Law Commission has asked for a recommendation on whether the UUDDA should be adopted in Wisconsin. She noted that Wisconsin has already adopted the uniform law regarding foreign declarations. The UUDDA would extend that law to domestic declarations... Council member Shriner spoke in support of studying the UUDDA, but observed that the Federal Rules of Civil Procedure have a similar provision that is much shorter. The federal counter-part is a very simple, useful rule. He spoke in support of adopting a similar rule in Wisconsin, although he expressed doubt that the rule needs to be as long and complicated as the UUDDA. He also questioned whether Wisconsin has the authority to impose criminal penalties for perjury, as stated in the uniform laws.

My Recommendation: Tom Shriner has worked hard on this project. We need to follow-up with the Legislature concerning the status of the UDDA in Wisconsin.

d. The May 19, 2017 Minutes contain the following:

The Council asked Attorney Southwick to contact Attorney Catherine La Fleur, a former Judicial Council member who uses the collaborative law process in her family law practice, to inquire whether she feels the Judicial Council is an appropriate body to study this issue. The Council resumed its discussion. Attorney Southwick reported that the State Bar Family Law Section Board is currently studying the UCLA, as well as rules proposed by the Collaborative Family Law Council of Wisconsin. Attorney La Fleur agrees that Wisconsin should have rules to regulate the collaborative law process and she felt that the Council would be an appropriate body to make a recommendation. She offered to provide a presentation to the Council to educate members on collaborative law.

My Recommendation: The study of collaborative law was voted down by the Council at the May 19, 2017 meeting by a vote of six to four. One of the primary reasons for the negative vote was the fact that there was not a lawyer member of the Council who practiced collaborative law. This is a growing practice area and deserves another look.

V. Committee Reports.

(a) Evidence & Civil Procedure Committee.

(b) Criminal Procedure Committee.

(c) Appellate Procedure Committee.

VI. Adjournment.

PUBLIC NOTICE

All meetings of the Judicial Council and its committees are open to the public. The Council's March 18, 2022 meeting will be only conducted by Zoom. Members of the public are welcome to join the meeting by using the URL which is set forth above, or by using the Zoom application and entering Meeting No. 885 9760 6743 and, when prompted, passcode 2323. However, members of the public must supply their name before they will be granted admission. If any member of the public disrupts the meeting in any way, they will be removed from the meeting and will be barred from

readmission. For more information, please contact the Chair of the Judicial Council, Mr. Gleisner, at 414-651-3182 or gleisnerwilliam@gmail.com.